United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7374

UNITED STATES COURT OF APPEAL
SECOND CIRCUIT

VANESSA TAYLOR, on behalf of herself and all other persons similarly situated,

APPELLANTS,

- against -

CONSOLIDATED EDISON CO. of New York, INC.; CHARLES F. LUCE, individually, and in his capacity as Chairman of CONSOLIDATED EDISON CO. of NEW YORK, INC.: ARTHUR HAUSPURG, individually, and in his capacity as President of CONSOLIDATED EDISON CO. of NEW YORK, INC.; THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; ALFRED E. KAHN, individually, and in his capacity as Chairman of the Public Service Commission of the State of New York; and EDWARD P. LARKIN, CARMEL CARRINGTON MARR, HAROLD A. JERRY, JR., and EDWARD BERLIN, each individually and in his capacity as Commissioner of the Public Service Commission of the State of New York, CONNIE ROHAN, as agent of the Public Service Commission,

APPELLEES.

B&S

AN APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS/APPELLANTS

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UNITED STATES COURT OF APPEAL
SECOND CIRCUIT

VANESSA TAYLOR, on behalf of herself and all other persons similarly situated, APPELLANTS, - against - CONSOLIDATED EDISON CO., of New York, INC.; CHARLES F. LUCE, individually, and in his capacity as Chairman of CONSOLIDATED EDISON CO. of NEW YORK, INC.: ARTHUR HAUSPURG, individually, and in his capacity as President of CONSOLIDATED EDISON CO. of NEW YORK, INC.; THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; ALFRED E. KAHN, individually, and in his capacity as Chairman of the Public Service Commission of the State of New York; and EDWARD P. LARKIN, CARMEL CARRINGTON MARR, HAROLD A. JERRY, JR., and EDWARD BERLIN, each individually and in his capacity as Commissioner of the Public Service Commission of the State of New York, CONNIE ROHAN, as agent of the Public Service Commission, APPELLEES.	C.A. DOCKET NO. 76-7374

AN APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS/APPELLANTS

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APPELLEES.

AN APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS/APPELLANTS

PRELIMINARY STATEMENT

This is an appeal from the Memorandum and Order, Judgment and Order (A-102-110)[1] of the United States District Court for the Eastern District of New York (Bruchhausen, D. J.); the final order was entered July 2, 1976, dismissing plaintiff's action for lack of jurisdiction.

[1] The references to the Appendix are denominated "A."

Timely Notice of Appeal (A- 111) to this Court was filed by plaintiffs on July 30, 1976.

ISSUES PRESENTED ON APPEAL

The primary issue presented for review by this Court is whether the District Court erred in dismissing on the ground of lack of state action this class action brought by named plaintiff pursuant to 42 USC §1983 seeking declaratory and injunctive relief to secure notice and hearing prior to discontinuance of electric service for alleged meter tampering and/or nonpayment of charges imposed therefor.

Also presented for review are other issues which were raised and contested by the parties below but were not reached by the District Court in dismissing plaintiffs' action. These issues are whether defendants termination of electric service without adequate notice or hearing is a violation of plaintiffs' constitutional due process and equal protection rights, and whether this action is properly maintainable as a class action.

Plaintiff/appellant (hereinafter "plaintiff") respectfully requests that in reversing the District Court's Order of Dismissal, this Court should remand the case back to District Court with instructions that the District Court certify the plaintiff class, enter summary judgment and grant permanent injunction for the plaintiffs.[2]

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[2] See Abrams v. Occidental Petroleum Corp., 450 F. 2d 157, 165-166 (2 Cir., 1971); McComb v. Utica Knitting Co., 164 F. 2d 670, 674 (2 Cir., 1947).

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

By this class action brought pursuant to 42 USC §1983 and 28 USC §1343(3), plaintiff on behalf of herself and all others similarly situated seeks declaratory and injunctive relief to protect their constitutional due process and equal protection rights to adequate notice and a hearing prior to discontinuance of electric service, where defendant public utility alleges meter tampering and/or nonpayment of charges and deposits due to alleged meter tampering.

Plaintiff filed her complaint on March 26, 1976 in the United States District Court for the Eastern District of New York. Plaintiff initially moved for class certification and a preliminary injunction. Defendants moved in two separate motions to dismiss the action. Plaintiff then moved for class certification, summary judgment and permanent injunction. By Memorandum and Order dated June 28, 1976, District Judge Walter Bruchhausen denied plaintiff's motion for summary judgment and granted defendants' motions to dismiss the complaint on the ground that the Court lacked jurisdiction because there was no state action. This appeal followed.

B. Statement of Facts

The essential facts are undisputed below. Plaintiff Vanessa Taylor moved into her present apartment in December of 1975. An account for electric service was opened with

defendant Con Edison on or about December 16, 1975. Two bills were rendered based on meter readings in the amounts of $3.50 and $4.00 per month. (A 56-57)

Plaintiff's electric meter is outside her building on a wall of the building inside a fenced yard. On March 11, 1976, Con Edison allegedly inspected the meters at the premises and allegedly found evidence of tampering on the meters for both apartments in the building. On March 13, 1976 Con Edison entered the property and turned off plaintiff's electric service. On March 12, 1976 plaintiff called Emergency Service and Con Edison turned service back on. Plaintiff was told to call on Monday, March 15, 1976. (A-22-23,38,58)

On March 15, 1976, plaintiff called Con Edison and was told the shut-off was a mistake. At 1:30 pm, the same day, an agent of Con Edison entered the property and disconnected and put a steel plate on the meter. Electric service was thereby discontinued. (A-58, 24)

On March 16, 1976 plaintiff called Con Edison again. She was told for the first time that Con Edison allegedly had found evidence of tampering. She denied any knowledge of the tampering. She was told that to have service restored she would have to pay a $100 charge plus an additional $100 deposit. (A-58)

On March 17, 1976, plaintiff called the defendant Public Service Commission, filed a complaint and asked to have service restored. The Commission called Con Edison, then called

then called plaintiff and told her that the Commission denied her request to have service restored and decided that in order to have service restored she would have to pay Con Edison the $200 charge and deposit. (A-58-59)

On March 18, 1976, plaintiff's attorney on her behalf spoke to the Public Service Commission. On March 23, 1976, plaintiff's attorney was told by the Commission that the shut-off was improper and they would instruct Con Edison to restore electricity. (A-59)

On or about March 23, 1976 the Commission contacted Con Edison and directed or requested that Con Edison restore plaintiff's electric service. Although plaintiff's service was restored, Con Edison contended and continues to contend that unless plaintiff pays the charge and deposit, Con Edison can enter the premises and disconnect the electric meter without notice or hearing. (A-59,99-100,24)

On March 26, 1976, plaintiff filed her complaint in the United States District Court for the Eastern District of New York challenging the constitutionality of the summary termination of her electric service without prior notice and hearing. Con Edison agreed to continue electric service to named plaintiff, pending determination of this action. On or about June 28, 1976 District Judge Walter Bruchhausen granted defendants' motions to dismiss the complaint on the grounds that defendant's action did not constitute state action. This appeal was taken by plaintiff. Con Edison has

agreed pending the outcome of this appeal to continue the named plaintiff's electric service.

C. Statutory and Regulatory Scheme

The provision of gas and electricity by public utilities in New York is governed by state statutes from two sources: the Public Service Law and the Transportation Corporations Law.

The Public Service Law §§ 64 through 77 deal with provisions relating to gas and electric corporations. In particular §66 deals with the general powers of the Public Service Commission in respect to gas and electricity.

The Transportation Corporations Law deals with gas and electric corporations at §§10 through 17. Section 14 gives the corporation authority to enter upon private property for the examination of meters, pipes, fittings, wires and works. Section 15 (A- 71) gives the sole authority to enter upon private property at specified times to take out or disconnect a meter. The second sentence of the first paragraph states that gas or electricity shall not be discontinued for nonpayment of bills rendered for service until after a five day notice.[3]

Pursuant to its authority under the law the Public Service Commission has promulgated regulations dealing with complaints and discontinuances. (A-72-81) Title 16 of the

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[3] This sentence was amended in 1937 by striking the words "for any cause" and substituting "for nonpayment of bills rendered for service."

New York Code of Rules and Regulations at Part 11 provides for complaints, investigations, hearings, and determinations. It also provides for a public hearing utilizing the procedures in Section 2.3 of Title 16.

Part 143 of Title 16 provides for Notices of Discontinuance. Although the time of notice pursuant to §143.1 applies to only nonpayment of bills rendered or deposit, the format of notice in §143.2 applies to "every notice indicating discontinuance."

The last set of rules governing Con Edison's conduct are found in the Tariffs (P. S. C. No. 8 - Electricity). General Information III Sections 9, 11, and 15 govern customers equipment, metering, billing, access to premises, and discontinuance or withholding of service (A-31-34). Some of these were adopted by Con Edison under authority of the Public Service Commission, e. g., Section 11, other sections were ordered by the Public Service Commission (Section 15). Provisions of the Tariff for discontinuance or termination of service provides that it may only be done "in such manner as may be provided by law under the circumstances." Id. at §15.

SUMMARY OF ARGUMENT

The District Court erred in dismissing this action on the ground of lack of state action. The involvement of the state in defendant's termination of plaintiff's electric service is clearly sufficient to constitute state action in this case. First, the sole authority in New York for

defendant Con Edison to enter private property to disconnect plaintiff's electric service is supplied by state statute which reverses the common law. Second, in New York State there is a significant and substantial involvement of the state through the activities of the defendant Public Service Commission, in a public utility's termination of electric service. The Public Service Commission in New York is intimately involved in the regulation of the utility's entire termination procedures. Finally, the Public Service Commission directly intervened in the process of termination of the named plaintiff's electric service. Therefore, this Court should reverse the order of dismissal of the District Court.

Upon reversal, this Court should remand this case back to the District Court with specific directions as to the resolution of other issues contested below but not reached by the District Court. Thus, this Court should direct the District Court to certify this action as properly maintainable as a class action on behalf of all persons in the State of New York whose electric service is discontinued or is threatened to be discontinued by defendant Con Edison or any other public utility without adequate prior notice and hearing, for alleged tampering with a meter or nonpayment of charges and deposits imposed therefor. This Court should

also instruct the District Court to enter summary judgment and a permanent injunction for plaintiff and make it clear that defendant's termination of plaintiff's electric service without adequate notice or hearing is violative of plaintiff's due process and equal protection constitutional rights.

ARGUMENT

POINT I

THE INVOLVEMENT OF THE STATE IN DEFENDANT'S TERMINATION OF PLAINTIFF'S ELECTRIC SERVICE IS SUFFICIENT TO CONSTITUTE STATE ACTION.

Plaintiff maintains this action under 42 USC §1983 to enjoin defendants from terminating her electrical service without a hearing when the meter has allegedly been tampered with. Such summary termination of services violates plaintiff's constitutional rights to due process and equal protection of the laws secured by the Fourteenth Amendment.

In Jacl › v. Metropolitan Edison Co., 419 US 315 (1975) the United States Supreme Court held that to find state action "the inquiry must be whether there is a sufficiently close nexus between the state and the challenged action of the regulated entity...." Id. at 351. There can be no doubt that the significant and substantial involvement of the state in the defendant's termination of plaintiff's electric service constitutes the state action found missing in Jackson.[4] In sharp contrast to Jackson, the sole authority in New York

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[4] Following the rules laid down in Jackson, the court in Condosta v. Vermont Electric Cooperative, 400 F. Supp. 358 (D. Vt.,1975) found that under the allegations the state had involved itself in the affairs of the utility company to such an extent that the company's terminating electric service constituted state action.

for the defendant Con Edison to enter private property to disconnect plaintiff's electric service is supplied by a state statute which reverses the common law. Further the Public Service Commission of the State of New York is far more intimately involved in the regulation of the utility's entire termination procedure than was the Pennsylvania Public Utility Commission in Jackson. The Public Service Commission directly intervened in the process of termination of the plaintiff's electric service in this case.

A. Con Edison's action in entering upon private property to disconnect plaintiff's electric meter was authorized solely by New York Transportation Corporations Law §15, which alone permits what could otherwise be a common law trespass.

It is well settled that state action is present when a state statute is relied on to legalize conduct that was formerly prohibited. Reitman v. Mulkey, 387 US 369 (1967), Hernandez v. European Auto Collision, 487 F. 2d 378 (2 Cir., 1973), Blye v. Globe-Wernicke Realty Co., 33 NY 2d 15, 347 NYS 2d 170 (1973), Culbertson v. Leland, 528 F. 2d 426 (9th Cir., 1975). Thus in Jackson no state action was present because in terminating service the utility company was merely exercising a right which had existed under the Common Law of the State of Pennsylvania before the advent of the regulation and which had only been codified by the regulation. Jackson v. Metropolitan Edison Co., supra, at 354 fn. 11. See also Shirley v. State National Bank of Connecticut, 493 F. 2d 739 (2 Cir.,1974), Cert. den. 419 US 1009 (1974) where it was held that the mere codification by the Uniform Commercial Code of the long standing right of a secured party to repossess his

security did not supply state action.

In New York it has always been a trespass to enter on the land of another to take one's own personal property. Newkirk v. Sabler, 9 Burb. 652 (1850), Goff v. Kilts, 15 Wend. 550 (1856), Blake v. Verome, 14 Johns. 406 (1817), Heermance v. Vernoy, 6 Johns. 5 (1810). As stated in Newkirk, supra, "[t]he mere fact that the plaintiff owns the chattel, gives him no authority to go upon the land of another to get it." Id. at 656. It is only Transportation Corporations Law §§14 and 15 which by reversing common law protects an electric or gas company against liability for trespass in entering the premises for a purpose comprehended by the statute. Goblet v. New York Power and Light Corp., 267 AD 1030, 48 NYS 2d 107 (3d Dept., 1944), Fortescue v. Kings County, 128 AD 836 (2d Dept., 1903), Dobbs v. Northern Union Gas Co., 78 Misc. 136, 137 NYS 785 (App. Term, 1st Dept., 1912), 19 N. Y. Jur., Electricity, Gas and Steam, §§55-56.

Prior to 1859 there was no statutory provision for entry onto private property by a Gas-Light Company.[5] In 1859 the

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[5] In 1848 Title XV:Gas-Light Companies was first enacted. Laws of 1848 Chapter 37 Sec. 19 provided, "Any person willfully injuring or causing to be injured any property of any corporation created under this act, shall forfeit and pay to the said corporation treble the amount of damages sustained by such injury, to be recovered in any court having cognizance thereof." The Laws of 1854 Chap. 109 §§1 and 2 added §§24 and 25 to Title XV. These sections provided that any person bypassing a meter or willfully injuring, altering or obstructing or preventing the action of any meter shall be guilty of a misdemeanor punishable by imprisonment or fine.

predecessors to the current Transportation Corporation Law §§14 and 15 were enacted.[6] Section 14 gives the utility the right to enter a building to examine a meter and §15 (A-71) gives the utility the right to enter premises to terminate services when the customer has neglected or refused to pay the rent or remuneration due.[7] The impact of these statutes on the common law was explained by the Second Department in Fortescue v. Kings County Lighting Co., supra, where the court held that although the utility was granted the right under the Transportation Corporations Law to enter the cellar to change a meter, it remained a trespass not to have complied fully with the Statute. Id. at 827. On the other hand, when the customer has paid for his electricity and the company consequently has no right under §15 to enter and terminate services, any entry by the company for that purpose constitutes a trespass, Dobbs v. Northern Union Gas Co., supra.

The statute, which is in derrogation of the common law has been strictly construed, and does not protect a public utility when it is not in the strictest compliance. Dobbs v. Northern Union Gas Co., supra; Fortescue v. Kings County

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[6] Sections 14 and 15 are the former §§67 and 68 (Laws of 1890 Chap. 566) and are derived from the Laws of 1859 Chap. 311 §§8 and 9.

[7] Section 15 was amended in 1938 so that its notice provisions no longer apply to any cause, but only to non-payment. Morris v. Consolidated Edison Co., 265 AD 743, 40 NYS2d 825(1943); Fisher v. Long Island Lighting Co., 280 NY 63, 19 N. E. 2d 682 (1939).

Lighting Co., supra; Reed v. New York Richmond Gas Co., 93 AD 453 (2d Dept., 1904); Velardi v. Consolidated Edison Co. of New York, Inc., 63 Misc. 2d 623, 313 NYS 2d 194 (Sup. Ct. N. Y. Cty., 1970); Brissette v. Con Edison, New York Law Journal, April 26, 1976, p. 6, Col. 1 (App. Term, 1st Dept.)

By enacting Transportation Corporations Law §§14 and 15 the state has created the legal right for the defendant electric company to come onto plaintiff's property and has also deprived plaintiff of her common law right to sue for trespass. Under such circumstances it is clear that the company acted "under color of law."

B. The State of New York has the requisite involvement with its public utilities and their termination procedures to constitute state action.

State action is also present in the case at bar because of the extensiveness of state involvement with and supervision over the company, not only with respect to its overall operations, but more importantly with respect to its procedures for terminating electrical service. Therefore, the "nexus" required by Jackson, supra at 351, between the state and the challenged action of the regulated utility exists without a doubt in this case.

Under New York law, Con Edison must not only provide "notice filing" of its tariff with the Public Service Commission, but must also secure the active approval of the Commission as to the "form" of its "contract" or "agreement" with consumers, any "charge" it makes and any "rule," "regulation," or "service" it has. New York Public Service Law §66.

The Tariff regarding "Discontinuance or Withholding of Service" (P. S. C. No. 8, General Information III, 15), (A- 34), the very tariff plaintiff is concerned with in her due process and equal protection argument, were issued under authority of Opinion No. 73-20 and order of the Public Service Commission[8] dated July 10, 1973. (See also Affidavit of Richard Arcari, (A- 29)). Furthermore this same area is regulated by Title 16, Parts 11 and 143 of the New York State Code of Rules and Regulations (A-76-81).

The New York Public Service Commission is invested by law with the power to hear and decide consumer complaints in this type of situation. Public Service Law §66. The Commission has the authority to have a staff member request that service be continued pending their hearing and determination of the claim. The Public Service Commission has the authority to order such a continuance of service where a utility refuses an informal request. Title 16, §1.3(d) New York Code of Rules and Regulations.

As demonstrated by the next section of this Brief, the Commission did in fact involve itself in the dispute which gave rise to this lawsuit.

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[8] In Jackson mere approval of a Tariff was found not to be "state action," however, it was suggested that when the state puts its own weight on the side of a practice by ordering it then state action would be found. Jackson v. Metropolitan Edison Co., supra, at 357.

In circumstances functionally indistinguishable from those presented in this case the Public Service Commission has now agreed to hold hearings and continue service in cases where it is alleged that meters and/or wires have been tampered with in such a manner that bills include charges for services diverted, stolen, or otherwise utilized by a third party. See Stipulation filed Howell v. Consolidated Edison,76 Civ. 2505 (MEF)(S.D.N.Y.) so ordered by District Judge Frankel (attached to this Brief).

By virtue of Public Service Law §65(1), an electric company is specifically prohibited from charging more than is allowed by order of the Commission. Under §66(5) the Commission is empowered to hear and decide a complaint that the utility's action is illegal, and to proscribe just and reasonable acts that must be done. Finally, under §66(1) of the statute, the Commission has general supervisory authority over the actions of all electric corporations. See also Title 16 New York Code of Rules and Regulations Part 11.

In Jackson, supra, the Supreme Court found that the involvement of the State of Pennsylvania in Metropolitan Edison was not sufficient to compel the conclusion that state action was present. There the only apparent state involvement with the activity complained of was in Tariff Regulation VIII of the Pennsylvania Public Utility Commission, Id. at 355, fn. 15. Furthermore, the sole connection of the state commission with this regulation was the company's simple notice filing with the commission and the lack of any

commission action to prohibit it. Id. at 355. The involvement of Con Edison in the case at bar, as detailed above, is both qualitatively and quantitatively greater than in Jackson and is of such magnitude as to lend the power of the state to Con Edison's actions in terminating electrical service.

C. The direct involvement of the Public Service Commission in this case constitutes state action.

It is of fundamental importance that, armed with the above enumerated powers, the Public Service Commission, received the named plaintiff's complaint, investigated, deliberated, granted interim relief, and ultimately affirmed Con Edison's action.

On March 17, 1976, plaintiff registered a telephone complaint with the Public Service Commission pursuant to their procedures. Defendant Rohan, an agent of the Commission, later stated that an investigation of the complaint was made by calling Con Edison. After "investigation" plaintiff was told by the Commission she would have to pay the required $200 charge and deposit. Thus initially the Commission affirmed the Con Edison decision.

After repeated inquiries to the Public Service Commission from plaintiff's attorney, on or about March 23, 1976, the matter was reopened. "Commission personnel intervened and requested the restoration of service pending our investigation."

Defendant Public Service Commission's Memorandum below dated April 21, 1976, at 3. Thereafter Con Edison restored service in response to a request from a Commission staff person.[9] (Affidavit of Richard N. Arcari, (A-24)).

Although power was provisionally restored at the request of the Public Service Commission, prior to commencement of this suit, plaintiff's attorney was informed that the Public Service Commission had decided that Con Edison was authorized to discontinue service (A-59-70).

By first affirming the company's action, then requesting that Con Edison restore service and then finally reapproving Con Edison's action in terminating service, the Public Service Commission has actively involved itself in the case of the named plaintiff and actively supported Con Edison's actions. In Condosta v. Vermont Electric Cooperative, Inc., 400 F. Supp. 358 (D. Vt., 1975) the court in ruling on a motion for judgment on the pleadings, held that state action would exist if plaintiffs could prove similar allegations that the Vermont Public Service Board had ordered termination of services. The court stated:

> Such an allegation stands in direct contrast to the findings of the lower courts in the Jackson case that no state official participated or cooperated in the termination there challenged. Id. at 365.

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[9] Although the exact date on which service was restored is in dispute, it is agreed that Con Edison restored service at the request of the Public Service Commission.

Likewise, the active participation and cooperation of the Public Service Commission in terminating the named plaintiff's electrical service warrants the ruling that such termination was state action. Con Edison and the Public Service Commission admit that it was the Public Service Commission investigation and interim request that led Con Edison to temporarily restore service.

POINT II

DEFENDANT'S TERMINATION OF PLAINTIFF'S ELECTRIC SERVICE WITHOUT ADEQUATE NOTICE OR HEARING IS VIOLATIVE OF PLAINTIFF'S CONSTITUTIONAL DUE PROCESS RIGHTS.

In this case, Con Edison provided no advance notice, let alone hearing, of any type prior to summary termination of plaintiff's electric service for alleged tampering.[10] Con Edison rationalized this arbitrary procedure by stating that there is an irrebuttable presumption that any tampering was done by or due to the actions of the customer whose service is measured by that meter. When a complaint was registered by the plaintiff with the Public Service Commission, that body decided to affirm Con Edison's decision, without holding a hearing or affording an opportunity to rebut, in any way, the presumption of tampering. These practices are squarely

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[10] It should be also noted that there is no provision for even a post-deprivation hearing in the instant case. See Hernandez v. European Auto Collision, 487 F. 2d 378 (2 Cir., 1973), and Blye v. Globe-Wernicke Realty Co., 33 NY 2d 15, 347 NYS 2d 170 (1973).

in conflict with the minimum requirements of due process.[11]

Under New York law, plaintiff has a statutory right to receive continuous electricity service from Con Edison, Bronson v. Consolidated Edison Co. of New York, 350 F. Supp. 443 (S.D.N.Y. 1972), Esposito v. Consolidated Edison Co., 68 NYS 2d 868 (1947), Manley v. Consolidated Edison Co., 187 Misc. 366, 63 NYS 2d 353 (1946), Transportation Corporations Law §12, and service may be discontinued only when specified conditions exist. Transportation Corporations Law §§12 and 15. In Goldberg v. Kelly, 397 US 754 (1970), the Supreme Court recognized that a statutory right to receive welfare benefits amounts to a property interest cognizable under the Fourteenth Amendment. Similarly, the statutory right to receive electricity as an essential public service, is property within the meaning of the Fourteenth Amendment and due process protection must be afforded before serv may be discontinued. Craft v. Memphis Light, Gas and Water Division, 534 F. 2d 684 (5th Cir., 1976) (right to due process protections before being deprived of electric,

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[11] Defendants have also chosen to ignore the common law of this state that would also require some form of hearing either by the Public Service Commission or a court before termination. Manley v. Consolidated Edison Co. of New York, Inc., 63 NYS 2d 353 (Sup. Ct., Queens Co., 1946). "The defendant in this case by unilateral action has determined the fact of tampering, the amount which it claimed to be due from the plaintiffs, and discontinued the electric service when plaintiffs did not pay this sum. No trial was had and no hearing was held before the Public Service Commission, or any other board. Even though the defendant may have intended to be fair in judging the facts and in estimating the amount due, its unilateral action permits it to be the judge of its own case. This is contrary to age old concepts of justice." Id. at 354.

gas and water services), Palmer v. Columbia Gas of Ohio,Inc., 479 F. 2d 153 (6th Cir., 1973) (gas services), Koger v. Guarino, Civil No. 73-2365 (E. D. Pa., May 3, 1976) (water service),Condosta v. Vermont Electric Coop., supra (electrical service),Donnelly v. City of Eureka, 399 F. Supp. 64 (D. Kan., 1975) (water service), Limuel v. Southern Union Gas Co., 378 F. Supp. 964 (W. D. Tex., 1974) (gas service), Davis v. Weir, 328 F. Supp. 317 (N. D. Ga., 1971) (water service), Bronson v. Consolidated Edison Co. of New York, supra, (electric service), Hattell v. Public Service Company of Colorado, 350 F. Supp. 240 (D. Colo., 1972) (gas and electric service), Lamb v. Hamblin, 57 F. R. D. 58 (D. Minn., 1972) (water service), Standord v. Gas Service Co., 346 F. Supp. 717 (D. Kan., 1972)(gas service).

This case is controlled by the fundamental due process principle reaffirmed in Goldberg, supra, that before the state or its instrumentality can deprive a person of property which is of basic importance to him notice and an opportunity for an evidentiary hearing must be afforded. See e. g., Craft v. Memphis, supra, Condosta v. Vermont Electric, supra, Limuel v. Southern, supra, Davis v. Weir, supra. The termination of electric service has already been held to present a situation of desperate need, comparable to welfare termination, calling for prompt and timely due process action prior to any proposed termination. Bronson v. Consolidated Edison Co. of New York,supra, Consolidated Edison Co. of New York v. Powell,

77 Misc. 2d 475, 354 NYS 2d 311 (Civil Ct. Bronx and New York Counties, 1974). As was stated in Powell, supra, "The right to use electricity...is an entitlement which is necessary to sustain life in today's world...." Id., at 477-478. One federal court in explaining the even greater threat to life and health that arises from termination of heat or electricity as compared with the termination of welfare benefits considered in Goldberg v. Kelly, observed that "A person can freeze to death or die of pneumonia much more quickly than he can starve to death." Palmer v. Columbia Gas Company of Ohio, 352 F. Supp. 241, 244 (N. D., Ohio, 1972), aff'd 479 F. 2d 153 (6th Cir., 1973).

Because of the severity of the harm resulting from termination of electric service, it is of the utmost importance that plaintiff have an opportunity to fully present her case at a hearing before service is terminated.

Plaintiff is clearly entitled to a full evidentiary hearing. It is a basic premise that where, as here, factual issues are in dispute, an effective opportunity to

defend against the proposed actions must include the right to confront adverse witnesses and to present arguments and evidence orally. Goldberg, supra.[12] Plaintiff herein contends that neither she nor anyone with her knowledge or consent tampered with her meter. Her meter is outside the building and access is unobstructed. Evidence can be presented that either a previous tenant or a neighbor tampered with plaintiff's meter.

Tampering is tantamount to fraud and the Supreme Court has made clear that full due process protection is mandated in situations where serious stigma may result. Board of Regents v. Roth, 408 US 564 (1972), Wisconsin v. Costantineau, 400 US 433 (1970). Finally, the irrebuttable presumption resorted to by Con Edison and approved by the Public Service Commission is just as odious to the Due Process Clause in this situation as it was in the multitude of other cases in which they were struck down. Cleveland Board of Education v. La Fleur, 414 US 632 (1974), Vlandis v. Kline, 413 US 441 (1973),

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[12] The conclusion that due process requires prior notice and an evidentiary hearing in the context of this case is not altered by the recent decision in Mathews v. Eldridge, ___ US ___, 47 L. Ed. 2d 18 (1976). There while reaffirming the result in Goldberg, the court held that in the context of social security disability determination that the chance to submit written submissions was adequate protection to the social security claimant in view of the unbiased medical testimony essentially constituting the basis of the agency determination. Alleged tampering is an entirely different situation. The chance to submit written statements, without the opportunity for cross-examination could not provide a sufficient method for determination of the factual issue presented. Plaintiff was not even given an opportunity to make a predetermination written submission. Goldberg v. Kelly, supra.

United States Department of Agriculture v. Murry, 413 US 508 (1973), Stanley v. Illinois, 405 US 645 (1972), Stewart v. Wohlgemuth, 355 F. Supp. 1212 (W. D. Pa., 1972), Owens v. Roberts, 377 F. Supp. 45 (M. D. Fla., 1974).

POINT III

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THAT CONSUMERS WHO ARE THREATENED WITH TERMINATION OF THEIR ELECTRIC SERVICE FOR ALLEGED TAMPERING OR NONPAYMENT OF CHARGES AND DEPOSITS RENDERED THEREFOR BE AFFORDED THE SAME PROCEDURAL SAFEGUARDS ALREADY GUARANTEED BY THE STATE TO CONSUMERS THREATENED WITH TERMINATION FOR NONPAYMENT OF BILLS RENDERED.

There is no rational basis for the Public Service Commission to deny plaintiff notice and a hearing prior to termination based on nonpayment of an extra deposit and charge imposed for alleged tampering, when other customers who do not pay any other bill for any conceivable reason or basis other than tampering are granted a prior hearing on demand. The requirements of equal protection requires that plaintiff be afforded the same protection that is routinely and regularly provided to every other customer in operatively identical circumstances.

In the case of discontinuance for nonpayment of bills rendered §15 of the Transportation Corporations Law requires that a five-day written notice be served. Title 16 New York Code of Rules and Regulations §143.2 proscribes the form of

said notice including the notice of availability of company procedures to consider customer complaints prior to discontinuance. Section 143.8 of the Regulations provides that an electric company must establish procedures to investigate a complaint in an appropriate and fair manner and promptly report to the complaining customer. The company may not discontinue pending investigation. Seciton 11.2 provides for the Public Service Commission to also investigate, hold hearing and determine complaints. Where the hearing mechanism there is not satisfactory a full public hearing can be called for pursuant to §2.3 of the same Title.[13]

Pending resolution of the entire matter the Commission may direct appropriate interim relief (§11.3(d)). See A-77.

The United States Supreme Court has definitively ruled that a state deprives a person of equal protection of its laws when it arbitrarily denies him the same hearing rights than it provides to others who are similarly situated. Stanley v. Illinois, 405 US 645 (1972).

As was stated previously, no convincing reason in terms of time, money or need is presented that would permit Con Edison to be the sole, unanswerable, unappealable authority in cases of alleged tampering, when a predeprivation hearing

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[13] There can be no question that state action exists in regard to plaintiff's action based on equal protection, since the Public Service Commission regulations clearly control the area of discontinuances for nonpayment.

machinery is available on demand in every other conceivable situation.[14] The consumer's need is no less desperate in this situation than it is in any other shut-off situation. There is absolutely no reason to believe that the existing hearing machinery would be unsuitable in these cases when it already considers a multitude of situations. There is just no logical reason why one group of people should be singled out from all others and never given a fair chance to defend themselves from crushing hardship. Persons threatened with discontinuance due to nonpayment of bills are afforded prior hearings. Bronson v. Consolidated Edison Co. of New York, supra. The hearing process has been extended to other areas which are not strictly nonpayment. Howell v. Consolidated Edison, supra. Plaintiff and her class remain as an isolated group whom defendants have arbitrarily determined not to cover by their hearing process.

No matter how Con Edison classifies a case of alleged tampering, by their own action they have imposed a charge and increased deposit upon the customer and now threaten to discontinue service if the charges are not paid. The case has been made indistinguishable from a case of nonpayment of bills in every way except that no notice or hearing are provided.

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[14] Prediscontinuance hearings have recently been extended by the Public Service Commission to cases of "tapping in" where the electricity being billed has been found or alleged to be diverted, stolen, or otherwise utilized by a third party. Howell v. Consolidated Edison, supra.

POINT IV

THIS ACTION SHOULD BE CERTIFIED AS A CLASS ACTION.

The plaintiff brings this action as a class action pursuant to Rule 23(a) and in addition, Rule 23(b)(2) or in the alternative Rule 23(b)(1)(A) or (B) of the Federal Rules of Civil Procedure.

This class is composed of all persons in the State of New York whose electric service to their residence is discontinued or is threatened to be discontinued without adequate prior notice and hearing by the defendant Con Edison or any other pbulic utility, for alleged tampering with a meter or nonpayment of charges and deposits imposed therefor.

The class herein is plainly "so numerous that joinder of all members is impracticable" Rule 23(a)(1). The total number of affected consumers is considerable but difficult to estimate. Defendant, Rohan, an employee of defendant Public Service Commission informed attorney for plaintiff that complaints regarding summary termination of service for alleged tampering are common. Information as to the number of terminations, threatened terminations or imposed charges and deposits is in possession of defendant Con Edison. Information as to the number of complaints or inquiries regarding the procedure is in the possession of defendant Public Service Commission.

Clearly, the alternative devices of joinder, intervention, consolidation and the individual test case are either impracticable if not impossible (Moore's Federal Practice, 2d ed., Vol. 3B, p. 23-280) or will fall short of providing full and adequate final relief for all similarly situated person.

The "questions of law and fact common to the class" (Rule 23(a)(2)) are whether each of the members of the class have been threatened with or have in fact suffered discontinuance of electric service for alleged tampering without notice and an opportunity to be heard on underlying questions of fact, and whether the denial of such an opportunity violates the minimal requirements or procedural due process and equal protectionof the law. The fact that there may have been variations in the circumstances leading to the defendant's action in each particular class member's case does not defeat the requirement. The fact is that the procedures followed by the defendant are substantially identical in all cases, and it is this identity which provides the common questions of law and fact. Escalera v. New York City Housing Authority, 425 F. 2d 853, 867 (2 Cir., 1970); cert. den. 400 US 853. The fact that some members of the class might personally be satisfied with the adequacy of the defendant's procedures as they are presently constituted does not negate an otherwise proper finding of common questions

of law and fact. Norwalk CORE v. Norwalk Redevelopment Agency, 395 F. 2d 920, 937 (2 Cir. 1968).

The claims of the named plaintiff are typical of the claims of the class, since they all assert the unconstitutionality of discontinuing electric service, without adequate prior notice or hearing, due to alleged tampering with a meter, or nonpayment of charges and increased deposit imposed therefor.

Even as to those members of the class who but for this action would not have quarreled with the procedures followed by the defendant, or those customers who may be ignorant of their constitutional rights and resigned to meet the defendant's imposed charges and deposit requirements against them on its own terms, it is clear that the implementation of the relief requested herein could not possibly work to their detriment, and will in fact be of positive assistance. In short, none of the class members, no matter how disinterested some may be in their procedural rights, is without concern for the problem of uninterrupted electric service to his family. For every member of the class, a factfinding hearing comporting with due process and with proper notice will be more conducive to exposing the truth than can be expected under the present procedures. Thus, the named plaintiff in supporting her claims will simultaneously advance the claims of other members of the class. Rule 23(a)(3) and (4). Counsel for plaintiffs, The Legal Aid Society, has legal resources and experience adequate to protect all members of the class and undertake to vigorously advance the interests

of all members of the class throughout this litigation. Rule 23(a)(4).

The prosecution of separate actions by individual members of the class would create a risk of varying adjudications with respect to individual members of the class which might establish incompatible standards of conduct for the defendants in this action, and would also create a risk of adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. Rule 23 (b)(1)(A) and (B). It is clear that separately prosecuted actions would involve the identical constitutional issues here presented and would therefore have binding precedential effect on later actions by other consumers, substantially impairing their ability to protect their own interests. Anderson v. City of Belle Glade, 337 F. Supp. 1353 (S. D. Fla., 1971); Denny v. Health and Social Services Board of Wisconsin, 285 F. Supp. 526 (E. D. Wisc., 1968).

The defendants' policies, practices and procedures are based on §15 of the New York Transportation Corporation Law, Title 16, Parts 11 and 143 of the New York State Code of Rules and Regulations, and the applicable Con Edison Tariffs. The defendants Con Edison and the Public Service Commission have refused to require and/or afford notice or

hearing to its customers in cases of alleged tampering. Although the individual fact patterns may vary somewhat, each and every person in the class has been denied the same constitutional protection.

Since all the prerequisites for maintenance of a class action pursuant to Rule 23(a) and Rule 23(b)(2) or in the alternative, Rule 23(b)(1)(A) or (B) of the Federal Rules of Civil Procedure are satisfied here, this action should be certified as a class action.[14]

CONCLUSION

For the reasons set forth above, plaintiff/appellant respectfully requests that the District Court's Order of Dismissal be reversed, and this Court remand the case back to District Court with instructions that the District Court certify the plaintiff class, and enter summary judgment and grant permanent injunction for the plaintiffs.

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[14] Defendant Con Edison suggested below there is no reason for a class because no useful purpose would be served. The assumption that defendants will inevitably apply a federal court's decision to all others similarly situated to the named plaintiff has sometimes proven unwarranted. See, e. g., Lewis v. Lavine (S.D.N.Y., 72 Civ. 4249, March 6, 1973) (Brieant, J.), where the Court certified the class in a §1983 welfare action because the state defendants had refused to apply the result in a prior non-class action (Doe v. Lavine, 347 F. Supp. 357 (S.D.N.Y., 1972)) to all persons similarly situated. A class should be certified as it ordinarily is, whenever the Rule 23 prerequisites have, as here, been satisfied, whether or not a class is deemed "necessary." Accord, Percy v. Brennan, 384 F. Supp. 800, 811 (S.D.N.Y., 1974); Short v. Fulton Redevelopment Co., Inc., 398 F. Supp. 1234 (S.D.N.Y., 1974); Klein v. Nassau County Medical Center, 347 F. Supp. 496 (E.D.N.Y., 1972); Fioto v. U. S. Department of the Army, 75 C 44 (E. D. N.Y., 1976).

RESPECTFULLY SUBMITTED,

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*Counsel would like to acknowledge the substantial contribution of Eleanor Montgomery a student at New York University Law School in the preparationof this Brief.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GLADYS HOWELL and MARGARITA DOMENECH, on behalf of themselves and all other persons similarly situated,

Plaintiffs,

-against-

CONSOLIDATED EDISON CO. OF NEW YORK, INC.; CHARLES F. LUCE, individually and in his capacity as Chairman of Consolidated Edison Co. of New York, Inc.; ARTHUR HAUSPURG, individually and in his capacity as President of Consolidated Edison Co. of New York, Inc.; THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK; ALFRED E. KAHN, individually and in his capacity as Chairman of the Public Serivce Commission of the State of New York; EDWARD P. LARKIN, CARMEL CARRINGTON MARR, HAROLD A JERRY, JR., and EDWARD BERLIN, each individually and in his capacity as Commissioner of the State of New York; and A.D. CALUP, as agent of the Public Service Commission of the State of New York,

Defendants.

Civil Action No. 76 Civ. 2505 (M.E.F.) (for referral to Judge Frankel after Docketing)

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the plaintiffs and for the Public Service Commission defendants herein as follows:

1. Upon the terms and conditions set forth below, plaintiffs' motion herein for leave to prosecute this action in forma pauperis, for class certification, and for a preliminary injunction, made returnable before the

Court on June 23, 1976, is hereby adjourned pending a review and determination by the Public Service Commission (hereinafter "Commission") of its policies and practices with respect to the handling and resolution of cases in which the Consolidated Edison Co. of New York (hereinafter "Con Ed") seeks to discontinue the electric service of residential customers for non-payment of bills which include charges for services diverted, stolen, or otherwise utilized by a third party.

2. With respect to all residential customers of Con Ed who are threatened with discontinuance of electric service for non-payment of bills which have been found or alleged to include charges for services diverted, stolen, or otherwise utilized by a third party, the Commission shall, during the period of the adjournment:

a) Afford every customer an appropriate opportunity to be heard before the Commission on the issue of whether there has in fact been a diversion, theft, or other utilization by a third party of all or part of the services billed for, as well as on any other relevant issue regarding the liability for and payment of the bill;

b) Pending such customer hearing and appeal, if any, to the Commission, and in any event during the period of the adjournment herein, the Commission shall direct Con Ed to withhold discontinuance of the customer's service for non-payment of any part of the bill in question, provided

that the Commission may require the payment of that portion of the bill, if any, which is undisputed. In unusual cases, and subject to the customer's right to an immediate appeal, the Commission may also require, pending its determination of a customer's complaint, that the customer pay that portion of the bill which the Commission determines, after reasonable customer input, is so clearly due for nondiverted service as not to be reasonably disputable.

3. Nothing contained in this stipulation shall be deemed to represent the position of any of the parties hereto with respect to any issue presented by the above-entitled action; nor shall this stipulation prejudice the right of any member of plaintiffs' proposed class to move to intervene in this action.

Dated: New York, New York
June 23, 1976

John E. Kirklin

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Attorneys for Plaintiffs

PETER H. SCHIFF
Attorney for Defendants
Public Service Commission, et al.

By
Arthur B. Cohn

SO ORDERED: /s/
MARVIN E. FRANKEL, U.S.D.J.

June 24, 1976